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No. 85-1700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,
Petitioners,

v.

MARY LITTLE PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY BRIEF

Of Counsel:

METZGER, SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005

JOHN D. SCHUPPER
STEPHEN N. DERMER
LOWENSTEIN, SANDLER, BROCHIN, KOHL, FISHER, BOYLAN & MEANOR
65 Livingston Avenue
Roseland, NJ 07068

EUGENE J. METZGER
(Counsel of Record)
SAMUEL SHEPARD JONES, JR.
DONALD L. HARDISON
1275 K Street, N.W.
Washington, D.C. 20005
(202) 289-4520
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22 of the Rules of this Court, petitioners reply herein to the arguments of respondents that the case is moot due to a recent amendment of the New Jersey antitrust law and that, in any event, the Court of Appeals was correct in holding that an antitrust challenge to the merger of two national banks may properly be brought in state court under state antitrust statutes.

I.

A. Respondents assert that no "live" issue remains in this case since the market share of petitioners' merged national banks does not reach the figure proscribed by the recently amended New Jersey market "cap" statute. That it did not exceed the "old" state market "cap" did not, of course, preclude the institution or maintenance of the present suit. Respondent banks suggest, however, that "[a]t this point in time" (Br. in Opp. at 6) they do not intend to pursue any claim that the merger violates the state statute, and they claim that the case is therefore moot. As this Court has held, "[t]he burden of demonstrating mootness 'is a heavy one,' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co., Inc.*, 345 U.S. 629, 632-33 (1953). Respondents have failed to sustain this burden, and it is clear that the question involved—the applicability to national banks of state antitrust laws, such as market "cap" statutes—remains very much in controversy between the parties.

Section 17:9A-345(a) of the New Jersey statute, before and after amendment, related *only* to the acquisition of *bank stock*;[1] it did not, and does not, purport to reach acquisition by merger or by consolidation. Section 1842 *et seq.* of Title 12, U.S.C., refer to Bank Holding Company Act acquisitions and not to mergers or consolidations of commercial banks whether or not subsidiary to a holding company (unless so structured as to result in the acquisition of stock of a bank not previously controlled by the holding company).

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[1] The statutes cited in this Reply Brief are set out in the Appendix, *infra*.

The Third Circuit made two critical holdings: (1) The federal standards of the Bank Merger Act (and, inferentially, of the Bank Holding Company Act) are not exclusive but may be negated by the application of state law; (2) the merger of two national banks (the exclusive province of the U.S. Comptroller of the Currency since the enactment of section 215a(a) of Title 12, U.S.C., and New Jersey's parallel enactment of section 17:9A-148) can, if there is a holding company parent of the resulting bank, be subject to state antitrust law (itself limited to stock acquisitions by holding companies) and, beyond peradventure, may be tested under that state law in state court.[2]

This action cannot be considered moot since the opinion of the Third Circuit *presently* bars petitioner Bancorporation or any of its subsidiaries from mergers with any of ten or more large commercial banks, savings banks or savings and loan institutions in New Jersey (many of which affiliations would not violate federal antitrust standards) without being forced to litigate that merger through the state court system (with the State Attorney General in opposition all the way) before being able to seek federal court review, and then only by way of certiorari in this Court. As a practical matter, such a ponderous route would ef-

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[2] Compare this Court's ruling in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, 379 U.S. 411 (1965), that judicial economy would require that, where a statutory scheme (the Bank Merger Act here) provides for administrative review, judicial intervention should await the last required administrative action and then take the form of an appeal from that agency action. Here the last such administrative action is the approval of the Comptroller of the Currency. This action preceded and prescinded from that approval.

fectively preclude any such merger. Far from being mooted, the issues are critically in focus.

The issue before this Court is whether "in any judicial proceeding attacking a merger transaction," 12 U.S.C. § 1828(c)(7)(B), as a "violation of any antitrust laws" (other than § 2 of the Sherman Act), *id.*, "the standards applied by the court shall be identical with those that the [federal] banking agencies are directed to apply" (i.e., the competitive standards of the Sherman and Clayton Antitrust Acts), *id.* If so, then petitioners were entitled to remove the action to federal court, 28 U.S.C. § 1441(a), and the judgment of the Court of Appeals mandating a remand to the New Jersey state court system is patently erroneous. This issue is in no way "mooted" by a subsequent adjustment by the State Legislature to one of the two different state statutes invoked by the bank respondents as the basis of their claim to enjoin the merger. No matter what state law says, 12 U.S.C. § 1828(c)(7)(B) governs "in any judicial proceeding," and the ordered remand to state court necessarily should be reversed, so that the federal court's jurisdiction over the suit in the first instance is restored.

B. Even if this Court were to find that this case is now moot, the Court should not simply deny the petition without comment. Respondent banks have obtained a judgment from the Court of Appeals holding that anyone can challenge this or any other merger of insured banks in state court under substantive state standards that conflict with those of the Sherman and Clayton Acts. Such a judgment could prevent petitioners from contending in a related case still pending in state court and involving the same par-

ties,[3] as well as in subsequent actions by respondents challenging future New Jersey bank mergers, that the federal standards are exclusive. This Court has long recognized that decisions mooted during the appellate process can control subsequent litigation under the principles of res judicata and collateral estoppel, and that an appeal in such a case should not simply be denied or dismissed. The Court has rather adopted the practice of eliminating such prejudice in cases where mootness precludes a decision on the merits:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. [*United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).]

Accordingly, if the Court agrees with bank respondents that this case is now moot due to the intervening amendments of the New Jersey market "cap" statute, the appropriate procedure would be to grant the petition and simultaneously to reverse and vacate the judgment of the Court of Appeals.

II.

The brief for the Commissioner of Banking of the State of New Jersey significantly shifts the ground upon which she argued below. Below, the Commis-

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[3] In the Matter of the Application of the National Bank and Trust Company of Gloucester County, Docket No. A-4934-84T1, Superior Court of New Jersey, Appellate Division. *See* the Petition in the present case, at 8 n.3.

sioner had contended that the bank transaction at issue was a merger, that because state law did not purport to reach the merger of two national banks, the transaction did not fall within the ambit of state law and was, consequently, a proper subject for summary judgment should the District Court reach petitioners' motion for dismissal on the pleadings.[4]

In its brief in opposition to the petition for certiorari, the Commissioner has adopted, for the first time, and in contravention to her position explicated above, bank respondents' contention that, besides being a merger of two national banks, the transaction is also a holding company acquisition through which the parent of the remaining national bank is, somehow, acquiring the stock of the merged bank. This argument has always been fraudulent. As the Court of Appeals acknowledged, Bancorporation did not, at any time, ever acquire a share of NB&T stock. *See* 783 F.2d at 362. NB&T at no time ever was or became a subsidiary of Bancorporation, passing out of existence by force of the merger. Because Bancorporation never acquired any stock of a bank not theretofore controlled and never merged with the parent of such a bank, the *Girard* case[5] could not have relevance. (That case involved both a holding company merger and the acquisition by Mellon of the stock of another bank, both occasions for the application of the Bank Holding Company Act, 12 U.S.C. § 1842).

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[4] Letter of Irwin I. Kimmelman, Attorney General of New Jersey, to the Honorable Maryanne Trump Barry, United States District Judge, July 25, 1985 (submitted in lieu of brief with respect to bank respondents' motion to remand and petitioners' motion to dismiss).

[5] *Girard Bank v. Board of Governors*, 748 F.2d 838 (3rd Cir. 1984).

The need for the shift is plain. The state statute which allegedly has some relevance to this transaction, N.J. Stat. Ann § 17:9A-345(a), is part of the New Jersey Bank Holding Company Act and, by its terms, is limited to transactions involving acquisitions of *stock* in another bank: ". . . shall acquire ownership of more than 10% of the stock of another bank. . .". Thus, the repeated references to an acquisition of NB&T's stock by Bancorporation, which never took place, is a necessary, albeit fictitious, element in bank respondents' case, now adopted by the State.

In any case, the Commissioner's brief suggests too much. If the instant bank merger "may also be regarded as an acquisition of a bank by a bank holding company and [therefore] subject to New Jersey statutes regulating acquisition of banks by bank holding companies," Commissioner's Brief at 11, then the challenge to the "acquisition" had to have been brought "in the first instance," (*Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company, supra,* 379 U.S. at 421 (1965)), before the Federal Reserve Board, followed (if desired) by an action in the *federal* court system challenging the Board's approval of the "acquisition."[6]

As *Whitney* states, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." 379 U.S. at 420. Indeed, one year after the *Whitney* decision the Congress enacted both the 1966 amendment to the Bank Holding Company Act, 12 U.S.C.

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[6] In fact, the Board in the present case quite properly never asserted jurisdiction. Jurisdiction was asserted by the Board in *Girard.*

§ 1842(c), and the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), both of which provide, as *Whitney* contemplated, a uniform and comprehensive system of federal bank agency and Justice Department review of the competitive aspects of all insured bank mergers (under "any antitrust laws," 12 U.S.C. § 1828(c)(7)(B)) and acquisitions (12 U.S.C. § 1842(c)), designed to be the sole method of testing the transaction on that issue.

Thus, and critically, *Whitney* makes clear that any issue of a possible violation of state law (allegedly possible only with respect to an "acquisition" by a bank holding company and thus subject to the Bank Holding Company Act) was to be resolved by the Board (and hence the federal courts) "in the first instance." 379 U.S. at 421.

Finally, respondents' reliance upon *Commercial National Bank of Little Rock v. Board of Governors*, 451 F.2d 86 (8th Cir. 1971) (holding that states may bar the existence of bank holding companies within their borders), and *Security National Bank and Trust Co. v. First West Virginia Bancorp, Inc.*, 277 S.E.2d 613 (W.Va. 1981), *appeal dismissed*, 454 U.S. 1131 (1982) (holding that states may bar multi-bank bank holding companies within their borders) is misplaced.

In *Security*, the Supreme Court of Appeals of West Virginia held that a state law that prohibited a bank holding company from owning more than one bank did not violate the National Bank Act. This holding was not surprising, since Congress left the states free to make a policy choice of whether or not they would allow multi-bank holding companies to operate within their jurisdiction. As the Solicitor General stated in his Brief for the United States as Amicus Curiae:

> Congress enacted Section 7 [of the Bank Holding Company Act, 12 U.S.C. 1846] to enable the states "to exercise a veto" over bank holding companies that otherwise might be organized as a means of avoiding state anti-branch banking laws. *Grandview Bank & Trust Co. v. Board of Governors*, 550 F.2d 415, 419-420 (8th Cir.), cert. denied, 434 U.S. 821 (1977). See also H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4, 14-15 (1955); S.Rep. No. 1095 (Pt. 1), 84th Cong., 1st Sess. 10-11 (1955); 102 Cong. Rec. 6920 (1956) (remarks of Sen. Robertson). [Brief for the United States as Amicus Curiae, at 5, in First West Virginia Bancorp, Inc., et al., Appellants v. Security National Bank & Trust Co., et al., Supreme Court Docket No. 81-219, filed December 3, 1981.]

Thus, the Solicitor General concluded that *Security* did "not result in such a 'direct and positive' conflict with federal banking law as to warrant a finding of preemption under the Supremacy Clause." *Id.*, at 4.

The present case concerns the Bank Merger Act of 1966, which does mandate a uniform federal antitrust standard for all insured bank mergers. Moreover, the language of preemption in 12 U.S.C. § 1828(c)(7)(B) is plain, not implied.

Respectfully submitted,

Of Counsel:

METZGER, SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005

JOHN D. SCHUPPER
STEPHEN N. DERMER
LOWENSTEIN, SANDLER, BROCHIN, KOHL, FISHER, BOYLAN & MEANOR
65 Livingston Avenue
Roseland, NJ 07068

May 1986

EUGENE J. METZGER
(Counsel of Record)
SAMUEL SHEPARD JONES, JR.
DONALD L. HARDISON
1275 K Street, N.W.
Washington, D.C. 20005
(202) 289-4520

Attorneys for Petitioners

APPENDIX

APPENDIX
STATUTORY PROVISIONS CITED IN REPLY BRIEF

28 U.S.C. §1441(a):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The National Bank Act, 12 U.S.C. §215a(a):

One or more national banking associations or one or more State banks, with the approval of the Comptroller, * * * may merge into a national banking association located within the same State, under the charter of the receiving association. * * *

The Bank Merger Act of 1966, 12 U.S.C. §1828(c):

* * *

(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank; * * *

* * *

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction,

the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. * * *

(5) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

* * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical

with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, * * *

* * *

(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia.

* * *

The Bank Holding Company Act as amended, 12 U.S.C. §1841 *et seq*:

§1842(a): It shall be unlawful except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. * * *

* * *

(c) The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or[1] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served. * * *

* * *

§1846: The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

N.J. Stat. Ann. §17:9A-148 (West 1984):

A. As used in subsection B of this section, "applicable Federal law" means the laws of the United States, as

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[1] "So in original. Probably should be 'of.' " 12 U.S.C. §1842, at 261 (1980).

presently enacted and as hereafter from time to time supplemented or amended, governing the merger or consolidation of a bank organized under State laws into a national banking association, under the charter of such association; * * *

B. One or more banks may, without the approval of the commissioner or any other officer, department, board or agency of this State, merge into or consolidate with a national banking association under the charter of such association, with the approval of the holders of at least 2/3 of the capital stock of each such bank entitled to vote. * * * [A] merger or consolidation authorized by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger or consolidation shall be subject to sections 132 through 147 or to any other law of this State; * * *

N.J. Stat. Ann. §17:9A-345, -347 (West 1984) (in effect prior to March 28, 1986):

§17:9A-345: Except as otherwise provided by sections 3 [§17:9A-346] and 4 [§17:9A-347] of this act, (a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next preceding such acquisition; * * *

§17:9A-347: Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 [§17:9A-345] of this act, if such acqui-

sition results from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

N.J. Stat. Ann. §17:9A-345 (as amended effective March 28, 1986):

Except as otherwise provided by section 3 [§17:9A-346] of this act, (a) No company or person which owns more than 25% of the stock of any bank located in this State or savings bank located in this State shall acquire ownership of more than 10% of the stock of another bank located in this State or savings bank located in this State or assume the deposit liabilities of another bank located in this State or savings bank located in this State in a manner which requires the approval of a federal regulatory authority pursuant to subsection (c) of section 18 of the "Federal Deposit Insurance Act," 64 Stat. 891 (12 U.S.C. 1828 (c)), or subsection (d) (11) and subsection (o)(2)(p) of section 5 of the "Home Owner's Loan Act of 1933," 48 Stat. 132 (12 U.S.C. 1464 (d)) if, at the time of that transaction, or if, as a result of that transaction, the company or person owns, or would own, more than 10% of the stock of one or more banks located in this State or savings banks located in this State, whose aggregate average deposits exceed 12% for the first year following enactment of this 1986 amendatory and supplementary act, 13% for the second year following enactment of this 1986 amendatory and supplementary act, and 13.5% for the third year and for the first one half of the fourth year following enactment of this 1986 amendatory and supplementary act of the aggregate average deposits of all depository institutions as of the two call dates for which published figures are available next preceding that transaction; * * *